No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL., *petitioners*

v.

STATE OF HAWAII, ET AL., *respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* EVAN MCMULLIN, ANNE APPLEBAUM, MAX BOOT, LINDA CHAVEZ, ELIOT COHEN, MINDY FINN, JULEANNA GLOVER, NORMAN ORNSTEIN, MICHAEL STEELE, CHARLIE SYKES, AND JERRY TAYLOR IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 4

I. EO-3 contravenes the prohibition on nationality-based discrimination that Congress, with support from almost all Republicans, adopted in 1965 5

A. Congress intended to eliminate "all vestiges of discrimination against any national group" from our immigration system 6

1. Members of both parties, and Republicans in particular, strenuously repudiated the discriminatory policies that predated the 1965 Act 7

2. The 1965 Act rectified missteps in U.S. immigration policy 12

3. The principles underlying the 1965 Act are now fundamental to our national identity 16

B. EO-3 runs afoul of Congress's nondiscrimination guarantee 18

II. The President may not substitute his alternative policy judgments for Congress's comprehensive statutory immigration scheme 21

Conclusion 29

Appendix 30

TABLE OF AUTHORITIES

Page(s)

Cases

In re Aiken Cty.,
725 F.3d 255 (D.C. Cir. 2013) 22

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 26

Arizona v. United States,
567 U.S. 387 (2012) 4, 22

Bilski v. Kappos,
561 U.S. 593 (2010) 25

Chae Chan Ping v. United States,
130 U.S. 581 (1889) 13

Fiallo v. Bell,
430 U.S. 787 (1977) 4

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 14

Galvan v. Press,
347 U.S. 522 (1954) 28

Gonzales v. Oregon,
546 U.S. 243 (2006) 26–27

Head Money Cases,
112 U.S. 580 (1884) 4

INS v. Chadha,
462 U.S. 919 (1983) 28

Kerry v. Din,
135 S. Ct. 2128 (2015) 23

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4, 5

Korematsu v. United States,
323 U.S. 214 (1944) 15

MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,
512 U.S. 218 (1994) 27

Morton v. Mancari,
417 U.S. 535 (1974) 20–21

Olsen v. Albright,
990 F. Supp. 31 (D.D.C. 1997) 12

State v. Trump,
265 F. Supp. 3d 1140 (D. Haw. 2017) 2

Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 27

United States Telecom Ass'n v. FCC,
855 F.3d 381 (D.C. Cir. 2017) 27

United States v. Witkovich,
353 U.S. 194 (1957) 26

Util. Air Regulatory Grp. v. E.P.A.,
134 S. Ct. 2427 (2014) 25

Wong Wing Hang v. INS,
360 F.2d 715 (2d Cir. 1966) 12

Constitutional Provisions and Statutes

U.S. Const. art. I, §§ 8, 9 4

8 U.S.C.
§ 1152(a)(1)(A) 2, 3, 5, 21
§ 1182(a)(1)(A) 22
§ 1182(a)(2)(A) 22
§ 1182(a)(3)(A)(i) 22
§ 1182(a)(3)(B)(i) 23
§ 1182(a)(3)(B)(iii) 23
§ 1182(a)(3)(B)(iv) 23
§ 1182(a)(3)(B)(v) 23
§ 1182(a)(3)(B)(vi) 23
§ 1182(a)(3)(D) 22
§ 1182(a)(4) 22

8 U.S.C. (cont'd)
§ 1182(a)(10)(C) 22
§ 1182(f) 5, 19, 24
§ 1185(a)(1) 5, 20
§ 1187(a)(12) 24
§ 1187(a)(12)(B) 24
§ 1202(b) 23
§ 1202(c) 23
§ 1202(d) 23
§ 1361 23
§ 1735(a) 23
§ 1735(b) 24
Act of April 27, 1904, ch. 1630, 33 Stat. 394 (1904) 13
Act of April 29, 1902, ch. 641, 32 Stat. 176 (1902) 13
Act of February 5, 1917, ch. 29, 39 Stat. 874 (1917) 14
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1214 (1996) 23
Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58 (1882) 13
Geary Act of 1892, ch. 60, 27 Stat. 25 (1892) 13
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 633, 110 Stat. 3009 (1996) 20
Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) 14
Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) 15

Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600 (1943) 15
REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 231 (2005) 23
Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888) 13
USA PATRIOT Act, Pub. L. No. 107-56, § 411, 115 Stat. 272 (2001) 23
Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242 24

Legislative Materials

111 Cong. Rec. 21,589 *et seq.* (1965) ..... *passim*
H.R. Rep. No. 68-350 (1924) 14
H.R. Rep. No. 89-745 (1965) 6, 16
H.R. Res. 683, 112th Cong. (2012) 17
S. Res. 201, 112th Cong. (2011) 16

Executive Materials

Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 28, 1979) 25
Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) 15
Proc. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) 25
Proc. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) 2, 25

Other Authorities

Michael Gerson, *Trump's Half-Baked Travel Ban Is a Picture of American Shame*, Wash. Post (Jan. 30, 2017) 17
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INTEREST OF *AMICI CURIAE*[1]

Amici are commentators, historians, political scientists, policy analysts, journalists, and former elected officials and political candidates who are concerned that President Trump's September 24, 2017 Proclamation is inconsistent with longstanding American values and principles of law. *Amici* write to provide historical context for the matters before the Court, particularly regarding conservative and bipartisan efforts to end nationality-based discrimination in U.S. immigration policy; to address important issues of statutory interpretation and separation of powers; and to draw attention to the core American values implicated by this case—among them the principle that individuals seeking entry to this country should be judged on the basis of their personal circumstances and character, rather than the accident of nationality, race, or place of birth. Individual *amici* are listed in the Appendix.

Amici hold a range of views, including on immigration matters, but all agree that Congress has prohibited the President from discriminating on the basis of nationality in making immigration decisions. They also agree that, where Congress has enacted comprehensive legislation in an area within its constitutional purview, and the President acts to contravene that scheme, principles of separation of powers and judicial restraint permit—indeed, re-

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae* or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* received consent from Respondents to file this brief. The Government provided blanket consent to the filing of *amici curiae* briefs, and a copy of that letter of consent is on file with the Clerk's Office.

quire—the Court to maintain the constitutionally allocated balance. *Amici* believe that this case should be decided on statutory, rather than constitutional, grounds, as set forth below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The September 24, 2017 Proclamation ("EO-3") conflicts with and exceeds the authority delegated to the President under the Immigration and Nationality Act of 1965, as amended ("1965 Act"). EO-3 relies on a sweeping interpretation of the President's statutory authority to impose indefinite entry restrictions on the nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia (collectively, with the exception of Venezuela and North Korea, the "Designated Countries").[2] Proc. 9645, 82 Fed. Reg. 45,161, 45,164–67 (Sept. 24, 2017). These nationality-based provisions run afoul of two aspects of the 1965 Act: (1) 8 U.S.C. § 1152(a)(1)(A) restricts the President's power to discriminate on the basis of nationality, among other characteristics, and (2) the comprehensive statutory scheme enacted by Congress to determine admissibility and address potential threats cannot be supplanted by the President. These statutory grounds allow the Court to avoid the difficult constitutional questions raised by the parties and provide the cleanest and narrowest basis for the Court to decide this case.

First, the text and history of the 1965 Act show that Congress intended to prohibit the President

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[2] Because plaintiffs did not seek to enjoin EO-3 as to nationals of Venezuela and North Korea, the issues before the Court relate only to nationals of the other six countries. *See State v. Trump*, 265 F. Supp. 3d 1140, 1148 n.10 (D. Haw. 2017).

from discriminating on the basis of nationality in making immigration determinations. For much of the 20th century, U.S. immigration policy barred or heavily restricted immigration by individuals of certain races and nationalities, including through a discriminatory national-origin quota system. In 1965, acting with broad bipartisan support, Congress decisively rejected the quota system and added a bar on discrimination that provides, subject to specific exceptions not applicable here, that "no person shall ... be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This prohibition was overwhelmingly supported by both Republicans and Democrats and reflected the longstanding, if imperfectly applied, American value that people seeking to enter this country should be considered on the basis of their individual characteristics. Republicans emphasized that the legislation was intended to "eliminate all vestiges of discrimination against any nationality group from our immigration law." 111 Cong. Rec. at 24,443 (1965). EO-3 violates the plain text of Section 1152 and attempts to revive discriminatory policies that Congress rightly repudiated.

Second, the President may not unilaterally supplant the comprehensive statutory scheme Congress enacted and has carefully amended over 50 years. This scheme provides a detailed framework for addressing the very issues that EO-3 purports to confront, among them the threat of terrorism and the variability among nations' capabilities and willingness to cooperate with American officials. EO-3 attempts to substitute the President's sweeping nationality-based restrictions for Congress's more tailored approach to inadmissibility, which requires

the President and the Executive branch to consider the individual qualities of each person. Viewed in the context of the statutory scheme, the President's limitless interpretation of his statutorily delegated authority cannot justify EO-3.

Because EO-3 conflicts with the nondiscrimination mandate of the 1965 Act and impermissibly substitutes the President's policy determinations for the judgments of Congress, it exceeds his delegated authority. For the reasons discussed below, this Court should affirm the court of appeals' decision on these statutory grounds.

ARGUMENT

The constitutional authority to regulate immigration lies with Congress, not the President. *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Head Money Cases*, 112 U.S. 580, 591 (1884). The Constitution allocates this responsibility both through Congress's general power "[t]o make all Laws" and through three relevant specific powers: to "establish an uniform Rule of Naturalization"; to regulate the "Migration" of persons; and to "regulate Commerce with foreign Nations." U.S. Const. art. I, §§ 8, 9. Accordingly, "Congress supplies the conditions of the privilege of entry into the United States," and any delegation of power to the executive is constrained by "congressional intent." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Because "[p]olicies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress," *Arizona v. United States*, 567 U.S. 387, 409 (2012) (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)), a President who seeks to make policy in the form of entry restrictions must act pursuant to a valid delegation of authority. Conversely, when the

President issues entry restrictions that conflict with or supplant Congress's legislated judgments, those alternative policy determinations lack the authority of law. *Cf. Knauff*, 338 U.S. at 543.

That is the case here. The President relies on two statutory provisions as purported authority for EO-3: 8 U.S.C. § 1182(f), which provides that the President may "suspend" or "restrict[]" entry of "aliens" under certain circumstances, and 8 U.S.C. § 1185(a)(1), which makes it unlawful "for any alien to ... enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." But those general delegations do not authorize the President to ignore or supplant other provisions of the comprehensive immigration framework Congress has enacted. Because EO-3 runs afoul of both Congress's explicit prohibition on nationality-based discrimination, *see* Section I, *infra*, and the statutory scheme as a whole, *see* Section II, *infra*, it is *ultra vires* and cannot stand.

I. EO-3 contravenes the prohibition on nationality-based discrimination that Congress, with support from almost all Republicans, adopted in 1965

Section 1152 provides, subject to specific exceptions not relevant in this case, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This discrimination bar, which reflects long-held American values, was the centerpiece of Congress's overhaul of the immigration laws in 1965. As applicable here, Section 1152 directly limits the President's claimed

power to implement immigration protocols that discriminate against nationals from specific countries without considering their personal characteristics.

A. Congress intended to eliminate "all vestiges of discrimination against any national group" from our immigration system

Prior to 1965, our immigration laws openly discriminated against certain groups based on country of origin. From the 1920s on, the governing immigration statutes included a quota system that strongly favored nationals of certain countries and disfavored or entirely excluded others. The 1965 Act broke with this odious history to end the quota system, added the broad discrimination bar in Section 1152, and established an immigration system that looks to individual characteristics, rather than membership in a group, as the basis for admissibility or exclusion. In enacting these reforms, Congress decisively rejected the discriminatory practices that had characterized U.S. immigration policy since the Civil War. It also sought to bring our immigration system in line with values that have animated the American identity since the founding of our Republic, sometimes in observance and sometimes in the breach. *See* H.R. Rep. No. 89-745, at 46 (1965) (explaining that the purpose of the 1965 Act was to create a "new system ... that is truly nondiscriminatory—a system that judges all men on the basis of individual merit and worth without regard to place of birth."). The President's attempt to resurrect discarded policies in the form of EO-3 must be considered in light of this history.

1. Members of both parties, and Republicans in particular, strenuously repudiated the discriminatory policies that predated the 1965 Act

By 1965, four U.S. presidents—Presidents Truman, Eisenhower, Kennedy, and Johnson—had criticized the national-origin quota system as discriminatory and "in direct variance with our American ideals." 111 Cong. Rec. 21,768–69 (1965) (statement of Rep. Donald Clausen, R-Cal.). President Johnson called on Congress to end that system, and a bipartisan coalition responded with the sweeping reforms of the 1965 Act.

Although the bill was a priority of President Johnson and was co-sponsored by two Democrats, Republican members overwhelmingly supported it. The measure passed the House by a vote of 320-69. *Id.* at 25,663–64. 119 Republicans voted for the bill; only 10 Republicans opposed it, and 12 did not vote. *Id.* They were joined by 201 Democrats, with 59 Democrats voting against and 30 abstaining. *Id.* In the Senate, the measure was adopted by unanimous consent. *Id.* at 25,615–16.

Republicans advocated passionately for the bill. They condemned nationality-based limitations as inequitable and discriminatory. *See, e.g.*, *id.* at 21,810 (statement of Rep. Gerald Ford, R-Mich.); *id.* at 21,807 (statement of Rep. Paul Fino, R-N.Y.); *id.* at 21,759 (statement of Rep. Clark MacGregor, R-Minn.). They advocated for a system in which people were "evaluated as individuals, not as incorrigible vassals of a racial, ethnic, or national strain." *Id.* at 21,818 (statement of Rep. Silvio Conte, R-Mass.). They emphasized that "[o]ur immigration law is predicated upon the principle that all aliens are ad-

missible into the United States unless there is some provision of the law which requires their exclusion." *Id.* at 21,589 (statement of Rep. Arch Moore, R-W. Va.). They appealed to the values of fairness and equal treatment. *Id.* at 21,818 (statement of Rep. Hastings Keith, R-Mass.). And they invoked a shared national identity as a reason to adopt the reforms. *See id.* at 21,778 (statement of Rep. Seymour Halpern, R-N.Y.) ("The practice of determining a man's eligibility for immigration on the basis of his place of birth, or in some cases that of his ancestors, has always appeared to me to be clearly at variance with the American principles we cherish."). These statements lent the weight of the Republican Party and conservative thought to the cause. *See id.* at 21,788–89 (statement of Rep. John Rhodes, R-Ariz.) (confirming that the House Republican policy committee had endorsed the bill and explaining that the Party had long supported "an immigration policy based upon the individual merit of each applicant rather than upon the individual's race, place of birth, or ancestry").

The statements below, drawn solely from Republican members, are representative of statements by both Republicans and Democrats. They reflect the broad support that characterized the immigration reform effort and affirm that nondiscrimination is truly an American, not a partisan, principle.

- "H.R. 2580 seeks to erase the discrimination and the preferences that were built up in the national origins legislation of the 1920's." *Id.* at 21,810 (statement of Rep. Gerald Ford, R-Mich.).
- "The single overriding point is that aliens should and must be evaluated ... as future

Americans, not as former Italians, or Greeks, or Congolese, or Ethiopians, or anything else." *Id.* at 21,818 (statement of Rep. Silvio Conte, R-Mass.).

- "The bipartisan work of [the Judiciary Committee] represents a signal achievement in an historic effort to bring justice, sympathy and understanding to those who yearn to share the hope that is America ... The present outrageously discriminatory policy makes second class nationalities of many of the world's people." *Id.* at 21,778 (statement of Rep. Seymour Halpern, R-N.Y.).
- "One of the most inequitable parts of our present law is the national origins quota system. It has been, from its very inception, a discriminatory law. It asks of the immigrant where he was born and does not treat the man of one nation as an equal of the man of another country. It does not look at [his] qualifications for life in the United States." *Id.* at 21,807 (statement of Rep. Paul Fino, R-N.Y.).
- "We should make the decision courageously and decisively so that all may know what our immigration policy is and so that all our friends around the world may know that they are equal friends, friends of equal status and not first- and second-class friends." *Id.* at 21,778 (statement of Rep. Robert McClory, R-Ill.).
- "If credit must be given to what is truly a national demand for immigration reform, then it must be distributed equally between members of both political parties. For this is genuinely a bipartisan bill ... [it] will place immigration

to the United States on a more rational and equitable basis—consistent with our national interests and our humanitarian ideals—without discrimination on the basis of race, color, religion, or national origin. It will recognize our character as a nation composed of the peoples of all the nations of the world, our role as the leader of the free world, and our commitment to freedom and justice for everyone, everywhere." *Id.* at 21,798 (statement of Rep. Florence Dwyer, R-N.J.).

- "In 1960 the Republican platform declared that the guidelines for our immigration policy should be based upon the individual merit of each applicant for admission and citizenship. This bill, H.R. 2580, as amended, does that." *Id.* at 21,759 (statement of Rep. William McCulloch, R-Ohio).
- "[T]he rationale for the abolition of the national origins quota system is that that system deliberately discriminates against many of the peoples of the world." *Id.* at 21,759 (statement of Rep. Clark MacGregor, R-Minn.).
- "[H.R. 2580] will correct inequities and injustices which have long been inconsistent with basic American concepts and with the overall national interest ... This new program ... will return to naturalization procedures the sense of fairness, opportunity and national pride which lies at the root of this nation of immigrants. The essence of this legislation, Mr. Chairman, is the elimination of injustice." *Id.* at 21,818 (statement of Rep. Hastings Keith, R-Mass.).

- "[T]he action that we are taking here is designed to equalize opportunity to people of all nations to come here should they meet the general qualifications imposed ... We are making clear to the rest of the world that we intend to eliminate all vestiges of discrimination against any nationality group from our immigration law, and in so doing that we intend to live up to our image as the land of opportunity." *Id.* at 24,443 (statement of Sen. Leverett Saltonstall, R-Mass.).
- "[T]he bill represents a major achievement for Congress in the effort to wipe out immigration policies which for more than 40 years have discriminated against certain people coming into this country on the basis of their place of birth rather than their ability and qualification to enter the United States." *Id.* at 24,469 (statement of Sen. Jacob Javits, R-N.Y.).
- "[T]oday, America's true worth and strength rest upon the contributions—morally, politically, socially, economically—of people of many national backgrounds and races. This is the unquestioned genius of the American experience ... Our immigration law is predicated upon the principle that all aliens are admissible into the United States unless there is some provision of the law which requires their exclusion." *Id.* at 21,589 (statement of Rep. Arch Moore, R-West Virginia).

Democrats were equally passionate in support of the 1965 Act's nondiscrimination guarantee. As Senator Kennedy proclaimed, "It will eliminate from the statute books a form of discrimination totally alien to the spirit of the Constitution. Distinctions based on

race or national origin assume what our law, our traditions, and our commonsense deny: that the worth of men can be judged on a group basis." *Id.* at 24,482–83 (statement of Sen. Robert Kennedy, D-N.Y.).[3]

The content, uniformity, and number of such statements—of which the above are a small subset—provides strong evidence that Congress acted purposefully to eliminate nationality-based discrimination from our immigration laws. Indeed, members of both parties and President Johnson recognized that this was the 1965 Act's overriding purpose.

2. The 1965 Act rectified missteps in U.S. immigration policy

Between the Civil War and World War II, American immigration policy was characterized by invidious discrimination on the basis of race and na-

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[3] The Government's position that Section 1152's discrimination bar does not extend to *nonimmigrants*, who constitute roughly 90% of visa recipients, Gov't Br. 57, cannot be reconciled with all other indicia of congressional intent. Discrimination against temporary workers, foreign students, and other nonimmigrant visitors—based solely on their country of origin—would fatally undermine Congress's goal to "eliminate *all* vestiges of discrimination against any nationality group from our immigration law." 111 Cong. Rec. 24,443 (1965) (emphasis added). Accordingly, Section 1152's discrimination bar has been applied to nonimmigrant visas, as well. *See Olsen v. Albright*, 990 F. Supp. 31, 38–39 (D.D.C. 1997) (holding that consulate policies "based on ... generalizations and stereotypes" constituted impermissible discrimination in the context of nonimmigrant visas); *cf. Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) ("invidious discrimination against a particular race or group" is an "impermissible basis" for immigration decisions).

tionality. The Chinese Exclusion Act of 1882 was the first federal law to exclude individuals on that basis. That law provided: "[I]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58, 59 (1882). The law prohibited Chinese nationals from becoming U.S. citizens and suspended immigration by Chinese laborers for 10 years. The Geary Act of 1892 extended this period by another 10 years, ch. 60, 27 Stat. 25 (1892), and Congress made it indefinite in the Act of April 29, 1902, ch. 641, 32 Stat. 176 (1902). Between the 1890s and early 1900s, individuals of Chinese origin, and particularly Chinese laborers, were a primary focus of nationality-based immigration restrictions. *See, e.g.*, Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888); Act of April 27, 1904, ch. 1630, 33 Stat. 394 (1904).

Regrettably, these discriminatory policies were ratified by the judiciary as legitimate exercises of legislative power. In 1889, the Court upheld the Scott Act, an addendum to the Chinese Exclusion Act that prevented Chinese laborers who had left the United States prior to its enactment from returning. *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581 (1889). The Court explained: "If ... the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security ... its determination is conclusive upon the judiciary." *Id.* at 606. Similarly, in 1893, the Court upheld the Geary Act's provision that Chinese noncitizens in the United States obtain certificates of residence by providing "at least one credible white

witness," among other requirements. *Fong Yue Ting v. United States*, 149 U.S. 698, 729–30 (1893).

In the Immigration Acts of 1917 and 1924, Congress expanded these race- and nationality-based restrictions to cover other parts of the globe. The 1917 Act created the "Asiatic Barred Zone," extending the restrictions of the Chinese exclusion laws to much of Asia and the Polynesian Islands. *See* Act of February 5, 1917, ch. 29, 39 Stat. 874 (1917). The 1924 Act adjusted and made permanent the national-origin quota system established in 1921, which favored nationals of Northern and Western European nations over Southern and Eastern Europeans, and excluded individuals who were ineligible to become citizens from the United States, effectively banning immigration from Asian countries. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) ("1924 Act"). The explicit purpose of the 1924 Act was to "guarantee, as best we can at this late date, racial homogeneity in the United States." H.R. Rep. No. 68-350, at 16 (1924); *see also id.* (explaining that the national-origin quotas had been "divided [so] that the arrivals from [certain] countries ... might be slowed down in order that the United States might restore its population balance").[4]

The invidious stereotypes on which these laws were based affected both citizens and noncitizens, inside and outside of the United States. During World War II, following more than a half-century of exclusion laws targeting individuals from Asia, the Government ordered thousands of permanent resi-

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[4] At the time of the 1924 Act, U.S. law limited naturalization to "free white persons and to aliens of African nativity and to persons of African descent." H.R. Rep. No. 68-350, at 6 (1924).

dents and U.S. citizens out of certain parts of the country and into internment camps on the basis of their Japanese ancestry. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Dissenting from the majority opinion in *Korematsu v. United States*, Justice Murphy warned of the dangers of discrimination based on stereotyped characteristics, even under the exigent circumstances of war:

> The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices.

323 U.S. 214, 239 (1944) (Murphy, J., dissenting).

Although the years immediately before and after World War II represented the culmination of decades of discriminatory exclusion policies, they also marked a turning point away from nationality-based stereotyping and toward individual consideration that ultimately resulted in the enactment of the 1965 Act. In 1943, Congress repealed the Chinese Exclusion Act and related laws. *See* Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600 (1943). Ten years later, Congress eliminated the racial bar on citizenship in the Immigration and Nationality Act of 1952, although that statute left the national-origin quota system in place. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

It is against this backdrop that Congress considered the Hart-Celler Act of 1965.

In decisions like *The Chinese Exclusion Case* and *Korematsu*, the Court's consent to government-imposed discrimination is widely seen as a nadir of American principles. To be sure, the Court is neither the regulator nor the conscience of its co-equal branches. But where, as here, Congress has acted unambiguously to eliminate nationality-based discrimination from our immigration laws, and the President seeks to contravene that intent, it falls to the Court to safeguard the statutory scheme. Such action is fully consistent with principles of separation of powers and judicial restraint.

3. The principles underlying the 1965 Act are now fundamental to our national identity

The bipartisan coalition that enacted the 1965 Act saw itself as engaged in a project to bring our immigration laws in line with longstanding American values. By rejecting the previous system and replacing it with the framework that, as amended, controls today, Congress sought to create a "new system ... that is truly nondiscriminatory—a system that judges all men on the basis of individual merit and worth without regard to place of birth." H.R. Rep. No. 89-745, at 46 (1965). These principles have been core to our national identity since the founding, although we have not always lived up to them. *See* S. Res. 201, 112th Cong. (2011) (explaining, in a formal apology for the Chinese Exclusion Act and related laws, that these laws were "incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created

equal"); H.R. Res. 683, 112th Cong. (2012) (similar statement by the House of Representatives).

EO-3 seeks not just to contravene Congress's purpose but to return us to a period of U.S. immigration history in which the values of equal treatment and individual consideration gave way to rigid race- and nationality-based preferences. *Amici* join many others in condemning such a shift. Conservative commentator Michael Gerson has explained the abiding implications for our national fabric:

> Our national identity—as for other nations—is ethnic and cultural. [The President's] America is vaguely Christian. Vaguely 1950s. Vividly white. A number of policies emerge from these convictions: a walled country, a closed economy and highly restricted immigration ... Every U.S. president since World War II has disagreed with the stunted and self-defeating view of the country now held by [the President]. Over the past century—in some ways from the beginning—the United States has been a cheerfully abnormal nation. American identity (in this view) is not based mainly on blood or soil, but rather on the patriotic acceptance of a unifying creed.

Michael Gerson, *Trump's Half-Baked Travel Ban Is a Picture of American Shame*, Wash. Post (Jan. 30, 2017), https://wapo.st/2uvajoc (discussing earlier executive order).

These concerns are not mere rhetoric. History shows that one form of discrimination leads to another, until we take action to stop it. In 1855, Lincoln acknowledged this effect in correspondence criticizing the nativist Know-Nothing party:

> I am not a Know-Nothing. That is certain. How could I be? ... As a nation, we began by declaring that '*all men are created equal*.' We now practically read it 'all men are created equal, *except Negroes*.' When the Know-Nothings get control, it will read 'all men are created equal, except Negroes, *and foreigners, and [C]atholics*.' When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty....

2 Abraham Lincoln, *To Joshua F. Speed*, *in* Collected Works of Abraham Lincoln 323 (Roy Basler ed. 1953).

Here, happily, the corrective path is straightforward. In 1965, Congress *did* take action to end the nationality-based discrimination that characterized our former immigration system, and subsequent administrations have reaffirmed this commitment. *See* Ronald Reagan, *Remarks on Signing the Immigration Reform and Control Act of 1986*, 22 Weekly Comp. Pres. Docs. 1533 (Nov. 6, 1986) ("Our objective is ... to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people."). To follow in the tradition of the highest American principles, it is necessary only to apply Section 1152 and give effect to Congress's purpose.

B. EO-3 runs afoul of Congress's nondiscrimination guarantee

The discrimination bar in Section 1152 is a more specific, later-enacted provision that limits the scope of Sections 1182(f) and 1185(a)(1), the two provisions upon which EO-3 relies. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183–87 (2012).

This analysis tracks familiar principles of statutory construction. First, Section 1152 is more specific than either Section 1182(f) or Section 1185(a)(1). Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). The Executive authority described in this provision—defined using general terms such as "[w]henever," "any," and "for such period"—is less specific in nature than Section 1152's prohibition on enumerated forms of discrimination with respect to the issuance of visas. Moreover, the authority to issue entry restrictions would not logically operate as an exception to a discrimination bar. On the other hand, a prohibition on nationality-based discrimination in the issuance of visas could (and, here, does) operate as an exception to a general grant of authority to withhold visas from individual "aliens" or "class[es] of aliens."[5]

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[5] The Government attempts to distinguish between visa issuance and admissibility to enter the United States, Gov't Br. 49–50, but it is undisputed that EO-3 functions to withhold visas from nationals of the Designated Countries. Moreover, the proposed distinction would make applesauce of the 1965 Act's purpose. Congress could not have intended to guarantee nondiscrimination at foreign consulates only to bar some visa holders on the basis of nationality at the point of entry.

Nor can Section 1185(a)(1) be considered more specific than Section 1152. Section 1185(a)(1) provides:

> Unless otherwise ordered by the President, it shall be unlawful ... for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). For the same reasons, this general language does not supersede Section 1152's bar on specific categories of discrimination in visa issuance.

Second, Section 1152 is later-enacted than both Sections 1182(f) and 1185(a)(1). With respect to Section 1182(f), the Government appears to concede the point. Gov't Br. 56 (raising a "later-enacted" argument as to Section 1185(a)(1), but not Section 1182(f)). With respect to Section 1185(a)(1), the Government notes that this provision was amended in 1978, Gov't Br. 56, but nothing in those amendments suggests that Congress intended to restrict the discrimination bar. In any case, Section 1152 was itself subsequently amended, in 1996, to add a specific limitation on its scope. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 633, 110 Stat. 3009, 3009 (1996) (adding Section 1152(a)(1)(B), which provides that the discrimination bar should not be construed to limit the Secretary of State's authority to determine the procedures for and location of immigrant visa processing). Ultimately, the point is immaterial, as Section 1185(a)(1) is too general in nature to control. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)

("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

Applying these principles of statutory construction, Section 1152 cabins the President's authority under Sections 1182(f) and 1185(a)(1). Indeed, the Government concedes that the President could not "use Section 1182(f) or 1185(a)(1) to revive the quota system, which would contradict Section 1152(a)(1)'s core purpose." Gov't Br. 52. The same is true with respect to the discriminatory provisions of EO-3. Congress intended for the discrimination bar to apply broadly. *See* 8 U.S.C. § 1152(a)(1)(A) (enumerating specific exceptions that do not include the grants of authority in Sections 1182(f) or 1185(a)(1)). There is no evidence that Congress intended for this discrimination bar to be limited by any other provision of the 1965 Act, or to prohibit only a quota system. On the contrary, the legislative history and historical backdrop show that Congress intended to eliminate all nationality-based discrimination from our immigration laws.

II. The President may not substitute his alternative policy judgments for Congress's comprehensive statutory immigration scheme

The President's delegated authority in Sections 1182(f) and 1185(a)(1) is further limited by specific provisions in the 1965 Act that address admissibility based on individual characteristics and anticipate potential threats, including terrorism and deficiencies in capabilities or cooperation by other nations. Taking this comprehensive legislative context into account, as required by principles of statutory interpretation, EO-3 attempts impermissibly to supplant Congress's careful legislative judgments with the

President's alternative policy determinations. But "the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.).

The 1965 Act constitutes an "extensive and complex" scheme for "[f]ederal governance of immigration and alien status." *Arizona v. United States*, 567 U.S. 387, 395 (2012). EO-3 attempts to override at least three aspects of the statutory framework: (1) Congress's decision to assess admissibility based on personal characteristics; (2) Congress's response to the threat of terrorism in the immigration context; and (3) Congress's criteria for participation in the Visa Waiver Program, which address potential deficiencies in foreign governments' vetting procedures.

First, Congress has adopted statutory categories for inadmissibility that eschew stereotypes regarding group identity. Rather, admissibility turns on whether a particular individual poses a specific health, safety, or security risk, or is likely to become a public charge. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A) (communicable diseases of public health significance); *id.* § 1182(a)(2)(A) (conviction of certain crimes); *id.* § 1182(a)(3)(A)(i) (espionage), *id.* § 1182(a)(3)(D) (voluntary membership in totalitarian political party); *id.* § 1182(a)(4) (public charge); *id.* § 1182(a)(10)(C) (international child abduction). Thus, Congress has crafted a detailed legislative scheme, amended over 50 years, that balances the need to confront such diverse threats as epidemics, crime, and totalitarianism with a commitment to the bedrock American principle that each individual should be considered on his or her own merit and circumstances.

Second, the 1965 Act provides robust measures to address the threat of terrorism. Since the 1990s, Congress has periodically enacted new legislation that has expanded and refined the list of "specific criteria for determining terrorism-related inadmissibility," *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring), to include additional categories of individual conduct and affiliations, *e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1214, 1268–69 (1996) (expanding categories of *individual activities* that constitute grounds for exclusion); USA PATRIOT Act, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345–50 (2001) (same); REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 231, 306–09 (2005) (same). Current immigration law excludes, among others, individuals who have "incited terrorist activity," served as "representative[s]" of a terrorist organization, or "received military-type training" from a terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(i). Terms such as "[t]errorist activity" and "[e]ngage in terrorist activity" are exhaustively defined. *See id.* § 1182(a)(3)(B)(iii)–(vi). Congress also has established rules for the vetting of visa applications, requiring documentation that allows immigration officials to screen for individuals' potential terrorist conduct and affiliations. *See id.* §§ 1202(b)–(d), 1361.

To the extent these assessments take nationality into account, Congress has prescribed detailed procedures for the Executive to follow. For example, in 8 U.S.C. § 1735(a), Congress specified a process for the Secretary of State, in consultation with other agency heads, to determine whether a national of a state sponsor of terrorism poses a national security or public safety threat for purposes of nonimmigrant visa

issuance. Congress separately regulates the Secretary of State's designation of state spo[illegible] of terrorism. *See* 8 U.S.C. § 1735(b).

Third, the current statutory framework identifies specific criteria for the Executive to consider in determining whether the nationals of a particular country may participate in the Visa Waiver Program. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989–91, codified at 8 U.S.C. § 1187(a)(12). Those criteria include assessments of a country's counterterrorism and anti-fraud capabilities, as well as its level of cooperation with the United States. 8 U.S.C. § 1187(a)(12)(B). Notably, Congress chose *not* to make a country's failure to satisfy the statutory criteria a basis for categorical exclusion of its nationals. Rather, it provided that a country's deficiencies would subject its nationals to heightened vetting procedures—namely, the requirement to obtain a visa rather than travel on the Visa Waiver Program. These provisions reflect Congress's chosen approach to addressing the risks associated with a country's deficient capabilities or cooperation.

EO-3 supplants, rather than complements, Congress's comprehensive statutory regime. While Congress gave the President gap-filling discretion to exclude certain "aliens" or "class[es] of aliens" upon a finding that their entry "would be detrimental to the interests of the United States," 8 U.S.C. § 1182(f), EO-3 does not purport to address exigent circumstances or, indeed, any circumstances different from or additional to those contemplated by Congress. On the contrary, its stated goal of addressing the deficient "capabilities, protocols, and practices" of the Designated Countries in order to "protect [U.S.] citi-

zens from terrorist attacks and other public-safety threats," 82 Fed. Reg. 45,161, 45,161–62 (Sept. 24, 2017), is one that Congress already has anticipated and pursued, including by recent amendments. EO-3 thus seeks to substitute the President's policies for Congress's legislated judgments on the very same subjects. By providing for a system of categorical exclusion, EO-3 renders irrelevant Congress's tailored solutions.[6]

The President's broad claim of authority to supersede congressional judgments is foreclosed by the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014) (quotation omitted). This principle goes hand-in-hand with the rule that courts must avoid any construction "that would render another provision [in the same statute] superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010). By giving effect to all provisions, but reading each in

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[6] The two examples of "[h]istorical practice" upon which the Government relies, *see* Gov't Br. 53, only confirm the extent to which EO-3 is an outlier. In 1979, President Carter responded to the Iran hostage crisis by delegating to his subordinates the Section 1185(a) power "to prescribe limitations and exceptions on the rules and regulations" that govern entry with respect to "Iranians holding nonimmigrant visas." *See* Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67,947 (Nov. 28, 1979). In 1986, President Reagan relied on Section 1182(f) to "suspend[]" the "[e]ntry of Cuban nationals as immigrants" where Cuba had declared its intention to violate a bilateral immigration agreement and was "facilitating illicit migration to the United States." Proc. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). Both situations involved exigent circumstances not contemplated by Congress in crafting the statutory scheme.

context, courts can construe statutory language in a manner that, "to the extent possible, ensure[s] that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

This canon is dispositive in interpreting the scope of Sections 1182(f) and 1185(a)(1), which, if read in isolation, would (as the Government argues) appear to grant the President unbounded authority. When contextualized in the comprehensive statutory scheme, however, the limited scope of the President's authority is manifest.

Several cases illustrate this principle. After the passage of the Immigration and Nationality Act of 1952, the Court was called upon to interpret a provision granting authority to the Attorney General to demand information from individuals subject to final deportation orders. *United States v. Witkovich*, 353 U.S. 194, 199 (1957). Standing alone, the provision suggested that the Attorney General could demand nearly limitless information from such individuals, backed by a threat of fine or imprisonment. But the Court rejected an invitation to read the provision "in isolation and literally" and looked to "the Act as a whole" to determine that Congress had not conferred on the Attorney General "unbounded authority." *Id.* The Court held that, in context, the information that the Attorney General could demand under the statute had to be related to the individual's availability for deportation. *Id.* at 199–202.

The Court similarly has applied this canon to interpret general authorizing statutes for the Executive branch within other comprehensive statutory schemes, including the Controlled Substances Act ("CSA") and the Communications Act of 1934. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 259–61

(2006) (Kennedy, J.) (holding that, despite the broad language of a CSA provision authorizing the Attorney General "to promulgate rules and regulations ... relating to the registration and control ... of controlled substances," 21 U.S.C. § 821, the Attorney General could not "transform the carefully described limits" found elsewhere in the CSA "into mere suggestions"); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220, 231–32 (1994) (Scalia, J.) (invalidating an FCC action taken pursuant to a broad grant of authority under the Communications Act of 1934 because, while the FCC's "fundamental revision of the statute ... may be a good idea, [] it was not the idea Congress enacted into law").

The courts of appeals also have recently applied these principles, including to enjoin the Obama Administration's implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016). The Fifth Circuit "appl[ied] the ordinary tools of statutory construction to conclude that Congress directly addressed, yet did not authorize, DAPA." *Id.* at 183 n.191. While the Obama Administration had relied on "broad grants of authority" in isolated statutes, the court held that such authority did not permit the Administration to override "the [1965 Act]'s intricate system of immigration classifications and employment eligibility." *Id.* at 183–84; *see also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (evaluating FCC's net neutrality rule in the context of legislative silence).

In short, the immigration policy the President seeks to implement is not the one Congress enacted.

Quite the opposite: Congress designed a statutory scheme that assesses admissibility on the basis of individual characteristics and conduct, rather than nationality, and chose to address potential threats through heightened vetting requirements, rather than categorical bars. The detailed inadmissibility criteria, the specific terrorism-related provisions of Section 1182(a)(3)(B), and the requirements for inclusion in the Visa Waiver Program—*not* the general gap-filling authorizations of Sections 1182(f) and 1185(a)(1)—are the mechanisms Congress established to determine which individuals should be excluded from the United States. Nothing in the 1965 Act gives the President authority to disregard Congress's considered and careful judgment and supplant his own policy in its stead.

* * *

Congress's primary authority over issues of immigration and naturalization "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). The role of the Executive, on the other hand, is the "enforcement of these policies ... formulat[ed]" by Congress. *Id.* "That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). Here, because EO-3 exceeds the authority delegated to the President in Sections 1182(f) and 1185(a)(1), the Court may resolve the case on statutory grounds. Congress expressly rejected the pre-1965 system of nationality-based discrimination, replacing it with a detailed scheme that requires individualized admissibility determinations, and it has refined this

framework to confront the very challenges that EO-3 purports to address. This comprehensive statutory scheme precludes the alternative policy determinations of EO-3.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully Submitted,

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March 30, 2018

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Evan McMullin is a co-founder of Stand Up Ideas, an organization dedicated to the promotion of democratic ideals, norms, and institutions. He ran as an independent candidate for President in the 2016 election.
2. Anne Applebaum is a Pulitzer Prize-winning historian and professor of Practice at the London School of Economics.
3. Max Boot is the Jeane J. Kirkpatrick Senior Fellow in National Security Studies at the Council on Foreign Relations, a columnist for the Washington Post, and a best-selling historian.
4. Linda Chavez is a conservative writer and former staff director of the U.S. Commission on Civil Rights during the Reagan Administration and U.S. Expert to the United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities.
5. Eliot A. Cohen was Counselor of the Department of State, 2007–2009.
6. Mindy Finn is a co-founder of Stand Up Ideas, an organization dedicated to the promotion of democratic ideals, norms, and institutions. She ran as an independent candidate for Vice President in the 2016 election.
7. Juleanna Glover is a corporate consultant who has advised many Republicans, including George W. Bush, Richard Cheney, John McCain, Rudy Giuliani, John Ashcroft, and Steve Forbes.

8. Norman Ornstein, a political scientist and expert on Congress and the executive, is a resident scholar at the American Enterprise Institute. He is signing as an individual.

9. Michael Steele is the former Lt. Governor of Maryland and the former Chairman of the Republican National Committee. He is signing as an individual.

10. Charlie Sykes is a conservative author and commentator. He is signing as an individual.

11. Jerry Taylor is the President of the Niskanen Center.